No. 21130

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of Supplemental Decision and Order of National Labor Relations Board.

REPLY BRIEF FOR PETITIONER.

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I.

The Respondent's Brief, Characteristically, Is Grounded Upon Isolated Bits and Pieces of the Evidence, Totally Ignores Unfavorable or Explanatory Testimony and, as a Result, Has Distorted the Record and Misrepresented the True Facts of This Case.

Introduction.

It is well worth note that the Trial Examiner's initial unfair labor practice finding in the instant case, as well as the Respondent's Decision and Order adopting that finding, occurred *prior* to the decision of the United

States Supreme Court in *American Ship Building Co. v. NLRB,* 380 U.S. 300. Because of this circumstance, the Board has placed its General Counsel in the unenviable position of justifying an "unfair labor practice" finding based on activities wholly legitimatized by that decision.

In the development of a supporting rationale, *post facto,* for an insupportable decision the General Counsel has, of necessity, resorted to a hit and run review of the record, ignoring certain key facts and testimony while drawing misleading and erroneous assumptions from others. Moreover, like a man grasping at straws, the General Counsel has selected only favored portions of the evidence, no matter how minute, and acts which, in and of themselves, are perfectly legal, has mixed all these together, and attempted to stigmatize the result as illegal.

The Court can uphold the Board's decision only if its findings are supported by "substantial evidence" and the conclusions drawn therefrom comport with the law. Petitioner submits that, upon close analysis, both the factual and legal bases for the Board's decision collapse like the house of cards upon which they are built. The Board should not be permitted to avoid its statutory obligations by nitpicking through the record and then taking refuge under the convenient haven of "expertise". We shall, in this brief, endeavor to point up those areas in which the inherent weakness of the Board's position has been exposed, and in so doing, demonstrate that its Decision is untenable.

As a preface to those following portions of the argument which deal with the so-called lock-out, Petitioner

cannot emphasize too strongly the point made in the Opening Brief that *there never in fact was a lock-out of the Petitioner's employees*, nor is there substantial evidence to support such a conclusion. We invite the Court's attention, in this connection, to the fact that the Board has continually sidestepped all of the evidence establishing that prior agreement had been reached the preceding Friday and that on 1 April a lock was *left* on the truck gate (not specially placed there) solely to facilitate the union meeting previously called. Consequently, we wish to make it quite clear at the outset that all references in this brief to the alleged lock-out are for the sake of argument only.

A. The Board's Contention That the Parties Failed to Reach Agreement on a Contract Can Be Supported Only by Disregarding All of the Relevant Testimony on That Score.

The Board attempts to support its finding that no agreement was reached on Friday evening, 29 March only by the bald assertion that,

> "The representatives (of the Independent) did not agree to accept the Company's wage offer and, once it was discovered that "Pepsi" was deadlocked on wages, there was no agreement on wages at all." (Resp. Br. pp. 14-15).

Thus conclusion totally ignores the abundant contrary evidence presented at the hearing. *All* of the testimony concerning this subject indicated that agreement was reached on the basis that Petitioner would institute an immediate $3.00 wage raise and would, additionally, match any higher increase given by *any other beverage*

company in the area.[1] Agreement, therefore, did not hinge on the concurrent negotiations at Pepsi-Cola; indeed, although the wage rate at "Pepsi" was checked by the Tonkins in response to employee Bernal Williams' suggestion [Tr. 82-83; Pet. Br. n. 13, p. 34], the fact that "Pepsi" was deadlocked on wages in no way affected the agreement reached at Seven-Up, which, in effect, amounted to a "most favored nation" clause. That is, if any other local bottler (and there were many more besides "Pepsi") paid a higher wage, Petitioner would match it.

The Board's protestations to the contrary are belied by its own admission that the Independent's officers consistently used the word *ratification* in their discussion with management on Friday night.[2] Obviously the question of ratification would never have arisen unless *there was in fact a prior agreement to ratify!* Once the fact of agreement is established, it becomes apparent that the locked truck gate on 1 April did not constitute a lock-out, in the traditional sense, at all. Believing that agreement had already been reached, the Company merely took steps to insure attendance at the meeting which the

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[1]Thus, for example, employee Jensen testified as follows: "Q. Was the point that Mr. Huleva mentioned regarding the Company's matching any other increase by Pepsi *or anybody else in the local bottling industry* a part of that general understanding? A. Yes, uh-huh." [Tr. 340-341]. (Emphasis added). This understanding was fully corroborated by employees Huleva, Fletcher, Olsen, Hill and Williams (See Pet. Br. n. 13, pp. 31-34).

[2]The brief of the Board states, "Moreover, the company does not dispute that the union representatives told the Tonkins that no agreement could be made *without a ratification vote* by the membership", and ". . . they had informed the Tonkins *that a ratification vote would be necessary.*" (Resp. Br. p. 15). (Emphasis added).

Union officers themselves called, and which the Company took to be a mere formality prior to execution.[3]

The Board further errs in its statement of the Employer's claim regarding the purpose for the lock-out (assuming, now, that one existed) when it states (Resp. Br. p. 16) that it was to force *ratification* of the contract already agreed upon. Petitioner vigorously disputes this. Firstly, ratification is purely an internal union matter and secondly, the Company was far from certain that the same was required.[4]

Petitioner's position, to make it perfectly clear, is that its aim was to secure *execution* of a contract it honestly believed to have been agreed to previously. Again, if *American Ship* permits a lock-out to pressure a union into accepting its proposals in the first instance, a lock-out to force a union to execute a contract already agreed to, as expressly permitted by Section 8(d) of the Act, presents an *a fortiori* case.

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[3]In this connection, Petitioner, after a re-examination of the record, concedes its error, as pointed out by Respondent, that three employees, rather than *one*, gave testimony from which it could be inferred that Harry Tonkin's remarks on Friday implied a threat to lock-out on Monday if no agreement was reached [Tr. 107-108; 76; 160]. But even if this be true, such a statement was perfectly legitimate. Since an employer is lawfully entitled to lock-out its employees, it can certainly threaten to do so [*Cf. NLRB v. Servette, Inc.*, 377 U.S. 46 at page 57]. However, the remarks themselves became purely academic when agreement was reached later than same evening, for this achievement wiped out the basis for any threatened lock-out.

[4]The rank-and-file employees testified that the Negotiating Committee had been *authorized* to conclude an agreement if their terms were met, that those terms were not only met but bettered, and that they believed matters had been settled on Friday without the necessity of ratification [Tr. 337-338; 342-344; 347; 350-352]. There is absolutely no evidence that during the union's meeting on Friday it was required or even suggested that a later vote was necessary to ratify the contract.

B. **The Argument That Petitioner's Motive in Locking Out Its Employees Was to Keep the Union "Subservient" to It Finds No Support in the Evidence and, Even if True, Cannot Be the Basis of an Unfair Labor Practice Finding.**

Respondent makes a great deal of the fact that the Independent Union was somewhat casually run and the conduct of its affairs sporadic, at least when election of officers or contract negotiations were not impending. Among other things, Respondent avers that the Independent was a "weak, loosely organized group originally established to keep the Teamsters out of the plant", in its effort to show that the lock-out was for the purpose of keeping the union "subservient" to Petitioner (Resp. Br. pp. 11-13; 3).

The testimony that the Independent was formed "to keep the Teamsters out" came from James Elder, an *employee,* who was primarily responsible for the Independent's formation and acted as its President for some time [Tr. 422]. All it indicates, therefore, is the feeling of Petitioner's *employees* about the Teamsters several years earlier, and well prior to the time the Company was purchased by present management, a fact which is totally irrelevant to the charges against Petitioner in this case. Respondents failure to indicate the source of this testimony is typical of its general approach to the evidence in this case and can only be interpreted as a deliberate attempt to mislead this Court into believing that Petitioner assisted the formation of the Independent Union for anti-Teamster reasons. As we point out below, nothing could be further from the truth.

Moreover, the evidence indicates that the Independent Union was an effective representative of its member-

ship. This is no where better shown than by the fact that Petitioner made concessions in practically every area encompassed in the Independent's list of contract proposals. That list designated hours of employment, health and welfare, wages, sick leave, route seniority and retirement as subjects of negotiation [R. 1; Tr. 50]. The concessions included a two-step wage raise and a supplemental "most favored nation" agreement that any further increase in the local beverage industry's wage scale would be matched by Petitioner; the granting of time and one-half for overtime for plant employees; oral concessions on the issue of paid holidays and sick leave; agreement that the driver salesmen bonus system would be re-examined and reorganized on a more favorable basis[5] (even though this was not formally requested by the union), and agreement by Petitioner to consider the establishment of an employee pension plan and to increase its contribution to the present health and welfare plan as soon as Petitioner was financially able.

Thus, out of six specific requests, three were accepted by the Petitioner: wages, over-time and sick leave. Two concessions, holidays and the bonus system, were added even though beyond the scope of the original demand. Two more, health and welfare and retirement, Petitioner promised to improve when financially able. On only one subject, that of route seniority, was the Independent unable to make headway. This evidence, all uncontradicted, certainly is diametrically

[5]This commitment was in fact fulfilled by the Company, as union President Hill's testimony discloses [Tr. 109; R. 14]. It therefore emphasizes the Company's good faith throughout the contract negotiations and underscores the true worth of its "oral concessions" which the Board seeks, so contemptuously, to disparage.

opposed to the Board's finding that the Independent was "malleable to (Petitioner's) will." (Resp. Br. p. 13).

Moreover, if the General Counsel and the Board mean to suggest, by use of the term "subservient", that the Independent was assisted, dominated or interfered with by Petitioner within the meaning of Section 8(a)(2) of the Act[6] prior to the so-called lock-out of April 1, such an inference is flatly contradicted by the *Board's own finding.* The Trial Examiner (and the Board) expressly found that:

> "*There exists in this record then no evidence that before the events in late March or early April, the Respondent* (Petitioner herein) *did any thing which might be characterized as assistance to or domination of the Union within the Act's meaning.* Although in late March, the Respondent was aware that the employees were showing some interest in the Teamsters, no claim of representative status was made by that organization until April 2. Thus, it appears that the Respondent was wholly free, at least until then, to deal with the union and to reach whatever agreement with the union that it could." [R. 21-22]. (Emphasis added).

On the other hand, if the word "subservient" is meant simply to denote that the Independent was a "weak" union, as opposed to a "strong" one, the Board has raised a false issue. To the extent there was "weakness" in the Independent, and this is not con-

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[6]The Act provides at Section 8(a): "It shall be an unfair labor practice for an employer— . . . (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

ceded, it was a consequence of the conduct of the membership and was in no way attributable to Petitioner. The only question in law is whether a union is dominated, assisted or interfered with *by the employer*. The fact that a union may be "weak" in no way alters the obligations imposed by law on an employer to recognize and deal with it. Yet, despite this, the Board cites the Independent's alleged ineffectiveness as evidence of the *Petitioner's* culpability.

The unspoken premise here is that somehow the Petitioner must deal differently with a "weak" union than with a "strong" one. Evidently the employer must also, at its peril, be charged with deciding whether a union is weak or strong, a startling proposition to say the least.

However, under the law, the fact that a union is ineffective is of no moment unless it is the consequence of the employer's conduct, and this was expressly negated by the decisions of the Trial Examiner and the Board below [R. 21-22].

At all times the Independent was an undominated, unassisted union representing a majority of Petitioner's employees. Therefore, Petitioner was free to deal with it to the full extent allowed by law, including locking out its members to secure agreement to its contract proposals. The Board's intimation that an employer may not lock-out a "weak" union (although presumably it could lock-out a "strong" one) is seen, upon analysis, to be made of whole cloth.

C. The Events of April 24, Including the Tonkins' Conversation With Hill and the Employees' Vote to Continue the Unfair Labor Practice Charge Provide Support for the Company's Position Herein.

Implicit in the Board's discussion of the April 24 meeting is the suggestion that by conversing with Howard Hill, the Independent's President, concerning the pending unfair labor practice charge, the Company engaged in improper behavior. Yet while this meeting was mentioned in the Trial Examiner's decision [R. 20], he attached no significance to it, and the meeting was not found by the Trial Examiner or the Board to have violated the Act in any way. The incident does not even appear in the Board's Supplemental Decision, from which this appeal is taken [R. 81-86].

According to Hill, this conversation arose spontaneously, not upon the edict of the Company and its entire tone and context was both casual and congenial. He made it plain that he believed it to be a sincere and genuinely motivated gesture on the part of both sides to ascertain what, if anything, was wrong and to explore reasonable means of setting it right [Tr. 91-97]. Hill's testimony makes it clear that he did not feel threatened or coerced and that he had no apprehensions in this respect. There was, therefore, nothing unlawful about the conversation. *S. H. Kress & Co. v. NLRB,* 317 F. 2d 225 (9th Cir. 1963); *NLRB v. I. Posner, Inc.,* 342 F. 2d 826 (2nd Cir. 1965) and cases there cited. Indeed, it would be an alarming principle were the Court to find, as the Board urges, something unlawful in a Company's discussion with the *President* of its employee's representative about the resolution of their differences.

As a further point, the Board contends that the vote of the membership, also taken on that day, to continue

pressing the unfair labor practice charge, was a vote of confidence for the Independent's officers and indicated that they had the cooperation and support of the rank-and-file (Resp. Br. p. 17). But at the time of this vote, April 24, the unfair labor practice charge on file alleged a violation of Section 8(a)(5) (refusal to bargain). Thus, a vote to continue the charge was a vote to force the Petitioner to bargain collectively with the *Independent,* not the Teamsters, as the recognized representative of the Company's employees. It therefore lends support to Petitioner's contention that the efforts of the officers to abandon the Independent in favor of the Teamsters Union did not reflect the wishes of the general membership, besides being in direct conflict with the fiduciary obligations imposed on the officers vis-a-vis the Independent by Federal Law.

Furthermore, the fact that the officers, despite their own desires, executed the collective bargaining agreement on Monday, April 1, can only be explained as an acquiescence by the officers in the mandate of the membership.

D. The Contention That Petitioner Interfered With the Independent by Forwarding a Copy of the Contract to the Board Under Its Name Is Not Supported by Substantial Evidence.

Consistent with its tendency to emphasize the picayune, the Board persists in citing the Company's transmittal of a copy of the contract in the Independent's name as evidence of its efforts to "forestall" Teamster's organization (Resp. Br. p. 12; 6-7). But the Trial Examiner *accepted* Millard Tonkin's testimony that he forwarded copies of the agreement to the Board's Regional Director, pursuant to the latter's formal re-

quest, over the printed signature of the union, "upon the understanding . . . that the union officials were agreeable to such a course, or perhaps even desirous of it. . . .". [R. 18].

Therefore, the Board's conclusion rests untenably on the undisclosed intent of the union's officers, rather than on Petitioner's motivation. President Hill had told Millard Tonkin that as far as he was concerned, Tonkin could send the contract in or not as he desired and that it was up to his discretion [Tr. 111; 39; 318]. The evidence supports only the view that Tonkin believed the Independent wished to communicate to the Board its interest in the matter and that he was accommodating it in complying with the Regional Director's request.

In this connection we note again there is no evidence that the union's rank-and-file was contacted by the officers or that *their* position on the matter of submission of the contract was solicited. On the contrary, Hill and Barwise acted on the advice of a *Teamster* representative [Tr. 38-39].

E. The Point Which Petitioner Makes Concerning the Applicable Standards of Review Was Not at Issue in the Walton Case and Has Not Been Disapproved by That or Any Other Decision.

The Supreme Court in *NLRB v. Walton Mfg. Co.,* 369 U.S. 404 reversed and remanded two of the cases cited by Petitioner, *NLRB v. Florida Citrus,* 388 F. 2d 630 and *NLRB v. Walton,* 286 F. 2d 16, only on the ground and to the extent that those cases appeared to rely on a special rule for testing the credibility of witnesses in discharge cases [Section 8(a)(3)]. The rule,

simply stated, was that the Board was forbidden to discredit an employer's testimony concerning its reasons for an alleged discriminatory discharge unless the testimony was impeached or contradicted in some manner by the General Counsel. Use of this special rule was held to be in conflict with the Court's decision in *Universal Camera Corp. v. Labor Board,* 340 U.S. 474.

However, Petitioner has not cited the above cases for that proposition. Rather, they, as well as the others cited in Petitioner's Opening Brief [p. 27], are relied upon to support the following rule: In the determination of whether there is substantial evidence to support the Board's decision, a closer scrutiny of the record than might otherwise be required becomes necessary where the Trial Examiner has uniformly credited all of the General Counsel's evidence and disregarded all of the employer's. This directive is not in conflict with the "substantial evidence" rule set forth in *Universal Camera, supra,* as confirmed by the opinions of several circuits. See, for example, *NLRB v. Cleveland Trust Co.,* 214 F. 2d 95, 98 (6th Cir. 1954); *NLRB v. United Brass Works,* 287 F. 2d 689, 691 (4th Cir. 1961); *United Packinghouse Workers of America v. NLRB,* 210 F. 2d 325, 330 (8th Cir. 1954).

The rationale of these cases most certainly applies under the instant facts where the Board's Supplemental Decision rests almost totally on the credit given to certain of the General Counsel's witnesses, notably Hill and Barwise, and then only to certain portions of their testimony, but where, on the other hand, the testimony of witnesses called by Petitioner has been almost wholly disbelieved.

II.

The Board Has Not and Cannot, Realistically, Distinguish the Case at Bar From American Ship Despite Its Tortuous Attempts to Do So.

It is conceded by the Board that the Company may have had "justifiable grounds which . . . might have permitted [its action]" (Resp. Br. p. 14) and that the lock-out "could have been related to a simple desire to secure the fruits of collective bargaining." (Resp. Br. p. 13). But, it continues, such was not the case, for Petitioner engaged in its lock-out for the wrong reasons and with a wrongful intent.

What were the Company's alleged motives? The Board declares that one purpose of the lock-out was to "discourage employee interest in a disfavored union (here, presumably the Teamsters) and to promote a favored union (the Independent)", citing *NLRB v. National Motor Bearing Co.,* 105 F. 2d 652 (9th Cir. 1939) and *NLRB v. Cowell Portland Cement Co.* (9th Cir. 1945) (Resp. Br. p. 13).

Aside from the fact that these cases were decided twenty years or more prior to *American Ship* and are wholly distinguishable, upon analysis, they *support* rather than detract from the contentions of Petitioner.

In *National Motor Bearing Co., supra,* the employer had no collective bargaining contract with any union. When Union A began organizing its employees, the Company, without warning, shut down its plant, signed a contract with Union B, which had no showing of majority support, and conditioned the rehire of its employees upon joining Union B.

Cowell, supra, involved a similar but even more extreme situation. There the employer shut down his

plant in an attempt to force his employees to renounce their membership in majority Union A, with which the employer had an existing agreement, and conditioned rehire on joining minority Union B, which the employer had formed.[7]

The facts of the present case are not merely distinguishable, but present the complete reverse of those in the cases cited by the Board. Here the Independent Union which, *arguendo,* was locked out, represented a *majority* of Petitioner's employees, while the Teamsters were a *minority* union. The fact that the Independent was, at all times, a majority union, undominated and unassisted by the employer is, we submit, both crucial and decisive in the resolution of this case. For, as we previously pointed out, the Board in *Deluxe Metal Furniture Co.,* 121 NLRB 995 (1958) and related cases, has held that an employer may deal freely with a majority union and execute an agreement prior to the filing of an outside representation petition, *even though he may be aware of a rival union's organizing campaign.*[8] The only difference between the instant case and *Deluxe Metal, supra,* is the existence of

[7]All would agree that the activities set forth in these cases, if true, would constitute violations of the Act. It was precisely this type of conduct which the Supreme Court had in mind when it stated in *American Ship,* "Similarly, it does not appear that the natural tendency of the lock-out is severely to discourage union membership while serving no significant employer interest. In fact, it is difficult to understand what tendency to discourage union membership or otherwise discriminate against union members was perceived by the Board. *There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union.*" [380 U.S. 312-313]. (Emphasis added).

[8]The Board does not answer this argument in its brief for the reason, we suggest, that the point is unanswerable.

an alleged lock-out. But just as an employer can deal with a majority union, so can he lock it out. *American Ship* held that the lock-out is an integral part of an employer's approach to collective bargaining. It certainly was not intended by the Supreme Court to hinge on the presence or absence of a competing union of unknown strength.

The case ar bar has yet another reverse twist aspect. In the *National Motor Bearing, Cowell* and *American Ship* cases, *supra,* it was uniformly understood that the union being "discouraged" was the one which *had been locked out.* The argument in those cases was premised on the theory that the lock-out would result in the disenfranchisement of the target union and pressure employees to join another union which was on more favorable terms with the employer. The Board has completely turned this concept around. It argues that the lock-out "encouraged" the established union (the Independent) and "discouraged" membership in the contender (the Teamsters). No case known to Petitioner supports this unique contention.

Next, the Board sets forth as "controlling authority" the cases of *NLRB v. Security Plating Co.,* 356 F. 2d 725 (9th Cir. 1966) and *Shattuck Denn Mining Corp. v. NLRB,* 362 F. 2d 466 (9th Cir. 1966) (Br. p. 14). Each of these cases found the Court confronted with an alleged discriminatory discharge violation within Section 8(a)(3) of the Act. As there is no discharge issue in the instant case, nor any lock-out issue in the former, these decisions are helpful, if at all, only by analogy, and can hardly be characterized as "controlling". Moreover, they merely restate the well-settled proposition that in discharge cases it is not

enough that a lawful cause exists for a termination if, in fact, the termination was made on the basis of an employee's union activities. Based on this rule, Respondent argues that although Petitioner might have had justifiable grounds for its lock-out, those grounds were not the motivating cause; rather, Petitioner acted for an illegal purpose.

Unquestionably, under *American Ship,* an employer's motivation may become critical in determining the propriety of a lock-out. However, we submit that "a desire to discourage negotiation through the Teamsters" (Resp. Br. p. 14), even if it existed, does not under the facts constitute *unlawful* motivation.

First of all, contrary to this Court's prior statement that Teamsters activities "were intimately interlaced with the events of April 1 and the earlier company-union contract negotiations" [352 F. 2d at 511], the evidence was that the first employee contact with the Teamsters did not take place until Sunday, 31 March, 1963 [Tr. 27; Pet. Br. pp. 14; 46].[9] Management had no actual knowledge of Teamster activity until the fact was volunteered by employee Barwise *after the contract had been signed,* on 1 April [Tr. 36; 270-271].

But, says Respondent, Harry Tonkin, on the previous Friday evening, had told the men he knew they had been approached by the Teamsters and, while he was mistaken on this score, Tonkin was nonetheless motivated by a desire to forestall their organizing attempts (Br. p. 12).

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[9]At page 13 of its brief, the Board notes with approval this Court's prior quotation regarding Teamster activity being "intimately interlaced", etc. Yet just one page earlier in its brief the Board has conceded that this was not the case. At page 12, note 3, it states, "The record does not disclose evidence of organizational efforts by the Teamsters among the Company's employees . . . prior to Sunday, March 31."

This contention is easily answered. Assuming Tonkin was "aware" of Teamster interest, although mistakenly, he certainly did not know its *extent*. Until presented with concrete evidence, in the form of a rival demand for recognition or a representation petition, the Company was obligated under the law to negotiate with the Independent Union. It could not have *assumed* that the Teamsters had majority support and ceased dealing with the Independent on that ground without violating Section 8(a)(5) of the Act. *NLRB v. Kellogg's Inc.,* 347 F. 2d 219 (9th Cir. 1965); *Snow v. NLRB,* 308 F. 2d 687 (9th Cir. 1962).[10]

It is undisputed that during the occurrence of the events here in question, the Petitioner entertained a genuine, good-faith belief that the Independent Union represented a majority of its employees. Therefore, its use of a lock-out to bring economic pressure to bear on that union to accept Petitioner's contract terms is fully protected by the law. The Board found the lock-out to be unlawful because it amounted to "coercion of (Petitioner's) employees" and "interference in the internal affairs of the union" (Resp. Br. p. 18). However, it is precisely this type of "coercion" which the *American Ship* court found to be the *lawful* counterpart of a union's right to strike.

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[10]Under these circumstances, Tonkin's alleged statements that he "Did not want to negotiate with the Teamsters" and "Wanted a contract with the Independent Union" (Resp. Br. pp. 12; 3-4; 6; 16) were perfectly proper. The Petitioner was obligated to deal with the Independent, it was doing so, and there was no question presented, at that time and under the law, of dealing with anyone else.

III.

Conclusion.

For the reasons set forth herein, and in Petitioner's Opening Brief, it is submitted that enforcement of the Board's Order be denied.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KYLE D. BROWN